

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH BRANDON SMITH,

Defendant-Appellant.

UNPUBLISHED

June 10, 2003

No. 237879

Cass Circuit Court

LC No. 00-010219-FC

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to life imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion for mistrial. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A motion for mistrial should be granted only for an irregularity which is prejudicial to the rights of the defendant and which impairs the defendant's ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

Defendant asserts that the prosecutor's failure to inform him of the witness' perjury at trial before defendant took the witness stand denied him a fair trial. Defendant argues that he would not have testified had the witness' perjury been put before the jury before defendant took the witness stand. We find that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

As this Court explained in *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998),

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction and that a prosecutor has a duty to correct false evidence. [Citations omitted.]

Furthermore, the prosecutorial duty to correct perjured testimony to include perjured testimony that related to the witness' credibility and not just the facts of the case. *Id.* at 277. In this case, it is undisputed that the witness gave false testimony at trial, but there is no evidence, and defendant suggests none, to indicate that the prosecutor was aware at the time the witness was on the witness stand that he was giving perjured testimony. However, the prosecutor was under an obligation to disclose the perjury as soon as he learned of it.

Despite the prosecutor's failure to disclose the witness' perjured testimony, defendant did discover that the witness gave false testimony before the close of proofs. A new trial is required only if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Id.* at 280. Because the witness was recalled to the stand and his perjury exposed to the jury, there is no question as to whether hearing the false testimony would have affected the outcome of the trial. Therefore, we find that a new trial is not warranted.

We reject defendant's contention that having this evidence presented before he testified would have changed his trial strategy, and he would not have testified. However, the only way to neutralize the evidence against him was to claim at trial that he was not the shooter and explain to the jury why he confessed and why the forensic evidence did not necessarily implicate him as the shooter. Nevertheless, even if the witness' perjured testimony had been exposed to the jury before defendant testified and defendant did, in fact, decide not to testify, we still conclude that the jury's verdict would not have been different. The witness' credibility was attacked throughout the trial. All instances of the witness' lying to police and perjury were presented to the jury. Therefore, the jury had the opportunity to assess what weight to give the witness' testimony. Had defendant not testified, the jury would have been presented with very little evidence to substantiate defendant's claim that he did not kill the victim. Apart from the witness' testimony, the forensic evidence and defendant's own confession implicated him as the shooter. Furthermore, defendant's credibility was undermined when the prosecutor presented the numerous different versions of that evening's and the next morning's events that defendant told police. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next alleges several errors in scoring his sentencing guidelines. The victim was murdered on January 1, 2000; therefore, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002). Defendant's sentencing guidelines range as scored by the trial court recommended a range of 225 to 375 months' or life imprisonment. Defendant was sentenced to life imprisonment. Defendant contends that if the trial court's scoring errors were corrected, his new sentencing guidelines range would be 180 to 300 months' or life imprisonment.

It is unnecessary for us to review the alleged scoring errors because even if defendant is correct, his sentence is still within the guidelines range, and, therefore, any error was harmless. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002). Moreover, based on the court's comments at sentencing, given the chance to sentence defendant again with life

imprisonment still being an option, it is apparent that the court would not reduce defendant's sentence. *Id.* at 274. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jessica R. Cooper

/s/ Karen M. Fort Hood